No. 16040

In the United States Court of Appeals for the Ninth Circuit

ALBERT S. CRAIG, ET AL., APPELLANT

v.

FAR WEST ENGINEERING COMPANY, INC., APPELLEE

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v.

ALBERT S. CRAIG, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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STATEMENT OF THE CASE

The Secretary of Labor, United States Department of Labor, files this brief as *amicus curiae* because of the importance of the coverage and exemption issues presented here to his duties in the administration and enforcement of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. Sec. 201, *et seq.*).[1]

[1] The Secretary, by virtue of Reorganization Plan No. 6 of 1950, 64 Stat, 1263, 5 U.S.C. 133z–15, effective May 24, 1950, is responsible for the duties theretofore vested in the Administrator of the Wage and Hour Division by the Act.

This is an action under Section 16(b) of the Act to recover overtime compensation, liquidated damages, and attorney's fees. It was brought against appellant, an engineering firm of Los Angeles, California, by certain of its employees who were engaged in the production of draftings and designs for aircraft, missile and electronic test equipment for interstate commerce (R. 45–47, 49, 51, 223–224). The draftings and designs were prepared for the Tucson, Arizona plant of the Hughes Aircraft Company (R. 162, 176, 223). On the basis of these facts the trial court held that the employees were "engaged in the production of goods for commerce" within the meaning of the Act (R. 53–55, 58). It also held that the employees were not exempt under Section 13(a)(1) of the Act as being "employed in a bona fide executive, administrative [or] professional * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)." It based this holding on its finding that each plaintiff was "an hourly employee" (R. 46, 47, 49–50, 51–52).

ARGUMENT

I. Plaintiffs were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act

The Fair Labor Standards Act applies to all employees "engaged in commerce or in the production of goods for commerce," and defines these terms in Section 3 (29 U.S.C.A. § 203) as follows:

> (b) "Commerce" means trade, commerce, transportation, transmission, or communication

among the several States or between any State and any place outside thereof.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character * * *.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

The preparation of draftings and designs for the manufacture of aircraft, missile and electronic test equipment, which is to be transported to points outside the State of its manufacture, clearly constitutes a "closely related process or occupation directly essential to the production" of such "goods" for "commerce" within the meaning of the Act.

In view of the Supreme Court's decision in *Powell* v. *United States Cartridge Co.,* 339 U.S. 497, there can be no doubt that aircraft, missile and electronic test equipment constitutes "goods" within the meaning of the Act. In *Powell,* the main question was whether the production of munitions was covered by the Act when the munitions were "for transportation outside of the state and for use by the United

States in the prosecution of the war, but not for sale or exchange" (339 U.S. at 511). In sustaining coverage for employees engaged in the production of such munitions, the Supreme Court relied upon the Act's broad definition of "goods." It also quoted the Act's statutory definition of "commerce" with emphasis on the language *"transportation * * * among the several states or from any State to any place outside thereof"* (*ibid.,* emphasis the Court's). This language, said the Court, includes "interstate shipments or transportation as such, and not merely * * * shipments or transportation of articles that are intended for sale, exchange or other trading activities," citing at this point its previous decisions holding that the federal "commerce" power extended to all kinds of "non-commercial" interstate movements and transactions (*id.,* at 512). Pointing out that the "Government's munitions plants provided an appropriate place for the beneficial application of the Act's standards of working conditions without danger of reducing employment through loss of business" (*id.,* at 511), the Court made the following statement which is equally apt here:

> This Act would fail materially in its purpose if it did not reach the producers of the tremendous volume of wartime goods destined for interstate transportation. In 1941–1945 the manufacture of munitions was a major source of employment. Wages and hours in that industry were a major factor in fixing the living standards of American labor. (*Id.,* at 511).

Pointing also to the Act's "specificity" in listing exemptions, the Court noted that Congress "could have exempted employees engaged in producing munitions for use by the United States in war, rather than for sale or exchange by it," but "Congress stated no such exemptions," and "[o]n the contrary, Congress included, by express definition of terms, employees engaged in the production of goods for interstate *transportation*" (*id.*, at 512, emphasis the Court's).

Today, the Government's tremendous missile program is similarly "a major source of employment" and "a major factor in fixing the living standards of American labor." And Congress has no more exempted from this Act work in connection with the production of missiles or missile test equipment for interstate transportation than it has exempted production of munitions destined for interstate transportation.

It is thus clear that aircraft, missile and electronic test equipment constitutes "goods" within the meaning of the Act. It is equally clear, we submit, that the preparation of draftings and designs for the manufacture of such "goods" is work "closely related" and "directly essential" thereto. As the Supreme Court pointed out in *Borden Co.* v. *Borella*, 325 U.S. 679: "Production of goods is not simply the manual, physical labor involved in changing the form or utility of a tangible article. * * * Equally a part of that pattern are the administration, management and control of the various physical proc-

esses together with the accompanying accounting and clerical activities. * * * He who conceives or directs a productive activity is as essential to that activity as the one who physically performs it." 325 U.S. at 682. Accordingly, employees performing the more intangible executive and office work in the Borden building were held to be "engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants" (*ibid.*).

And, in its most recent decision under the Act, *Mitchell* v. *Lublin, McGaughy & Associates,* 79 S. Ct. 260 (not yet officially reported), the Supreme Court sustained coverage for draftsmen, fieldmen, clerks and stenographers of an architectural and consulting engineering firm engaged in preparing plans and specifications for construction projects involving the improvement of instrumentalities of commerce. The following passage from the opinion of Chief Justice Warren is particularly pertinent:

> In our view, such work is directly and vitally related to the functioning of these facilities because, without the preparation of plans for guidance, the construction could not be effected and the facilities could not function as planned. In our modern technologically oriented society, the elements which combined to produce a final product are diffuse and variegated. Deciding whether any one element is so directly related to the end product as to be considered vital is sometimes a difficult problem. But plans, drawings and specifications have taken on greater importance as the complexities of design and

> bidding have increased. Under the circumstances present here, we have no hesitancy in concluding that the preparation of the plans and specifications was directly related to the end products and that the employees whose activities were immediately related to such preparation were "engaged in commerce." (79 S. Ct. at 264.)

The same conclusion was earlier reached by this Court in *Ritch* v. *Puget Sound Bridge and Dredging Co.,* 156 F. 2d 334, and by the Second and Eighth Circuits in *Laudadio* v. *White Construction Co.,* 163 F. 2d 383, and *Mitchell* v. *Brown,* 224 F. 2d 359, certiorari denied, 350 U.S. 875. In the *Ritch* case, this Court ruled that no distinction could rationally be drawn between so-called "white collar" workers ("draftsmen engaged in designing and laying out the work to be done by others") and workers physically engaged in construction operations which were performed "all pursuant to the draftsmen's plans" (156 F. 2d at 337).

The principles of the above cases, although they arose under the Act's "in commerce" phase of coverage, are equally applicable here. As the Supreme Court has pointed out, "the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce" (*Armour & Co.* v. *Wantock,* 323 U.S. 126, 131; and see *Chambers Construction Company* v. *Mitchell,* 233 F. 2d 717, 722–723 (C.A. 8)). If, therefore, the preparation of plans and specifications for instrumentalities of commerce is "directly related to the end products," the preparation of plans and

specifications for the manufacture of goods for commerce is, *a fortiori,* "closely related" and "directly essential" to the production of such goods.

This conclusion finds support in the Conference Report on the 1949 Amendments which introduced these terms into the Act. In reporting the change from "necessary" to "closely related and directly essential," the Managers on the Part of the House expressly stated that "[T]he bill as agreed to in conference also does not affect the coverage under the act of employees * * * who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce" (H. Rept. No. 1453, 81st Con., 1st Sess., p. 14).[2]

Draftings and designs, no less than tools and dies, are indispensable to the production of articles of advanced design in "our modern technologically oriented society" (*Lublin,* 79 S. Ct. at 264). They are an "integral part of the coordinated productive pattern of modern industrial organizations" (*Borden,* 325 U.S. at 683), "directly related to the end products" (*Lublin, supra*). The court below was thus clearly correct in holding that Far West's employees, who prepared draftings and designs for aircraft, missile and electronic test equipment, were engaged in the production of goods for commerce within the meaning of the Act.

An additional and independent ground of coverage exists by reason of the fact that the draftings and designs were sent outside the State. It is not disputed that during the period in controversy, 95 percent of

[2] The Senate Conferees' Statement cites *Borden Co.* v. *Borella,* 325 U.S. 679, with approval. See 95 Cong. Rec. 14874.

Far West's work came from the Tucson plant of Hughes Aircraft Company (R. 223). Nor is it disputed that Hughes Aircraft conceived the ideas (R. 249) and furnished, with its purchase orders to Far West, the basic design (R. 255)—a "layout drawing" or a "sketch" (R. 191–192)—for the work.

It is plain that in these circumstances the draftings and designs—in reality, scale pictures (R. 192)—are "goods"; the statutory definition in Section 3(i) of the Act goes beyond "wares, products, commodities [or] merchandise," and includes "articles or subjects of commerce of any character." And to draw, prepare and handle scale pictures is to "produce" them within the meaning of Section 3(j), which defines the term to include not only "produced, manufactured, or mined," but also "handled, or in any other manner worked on."

The breadth of these definitions is not only self-evident, but has been authoritatively confirmed by the Supreme Court in *Western Union Telegraph Co.* v. *Lenroot,* 323 U.S. 490. There the Court had no difficulty in concluding that telegraph messages are "articles or subjects of commerce" and hence "goods" under the Act (323 U.S. at 502), and that the terms "handled" and "worked on" in the statutory definition of "produced" include "every kind of incidental operation preparatory to putting goods into the stream of commerce." 323 U.S. at 503.

The rationale of the *Western Union* case has been applied by the courts to documents and policies prepared, issued and handled by banks and insurance companies (*Union National Bank of Little Rock* v. *Durkin,* 207 F. 2d 848 (C.A. 8); *Bozant* v. *Bank of*

New York, 156 F. 2d 787 (C.A. 2); *Darr* v. *Mutual Life Insurance Co.,* 169 F. 2d 262 (C.A. 2); certiorari denied, 335 U.S. 871), and to advertising materials and book manuscripts edited and prepared for printing (*Baldwin* v. *Emigrant Industrial Savings Bank,* 150 F. 2d 524 (C.A. 2), certiorari denied, 326 U.S. 767). In every essential respect, the draftings and designs here are as much "goods" as the papers and documents in the foregoing cases, since in each case the preparation of the documents was a principal purpose of the employer's activity and the vital part of its business, the shipment was indisputably interstate, and the product had considerable physical substance and was useful in itself.

On page 5 of its "Opening Brief," Far West cites *McComb* v. *Turpin,* 81 F. Supp. 86 (D. Md.), where it was held that plans and specifications are not "goods" within the meaning of the Act because they "are not themselves the subject of barter or sale, but only the written embodiment of professional advice, and incidental thereto" (81 F. Supp. at 89).[3] The *Turpin* decision, however, antedates the Supreme Court's holding in the *Powell* case, *supra,* that there is "no merit in an interpretation of the Act which

[3] Far West cites a number of other cases which have little or no authoritative value. Thus, *Mitchell* v. *Kroger Co.*, 150 F. Supp. 30, cited on page 6 of its "Opening Brief," has been reversed by the Eighth Circuit. See 248 F. 2d 935. *Koepfle* v. *Garavaglia*, 200 F. 2d 191, and *Nieves* v. *Standard Dredging Corp.*, 152 F. 2d 719, cited on page 5 of the "Opening Brief," were, in effect, overruled in *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427. And the result reached by the Third Circuit in *Mitchell* v. *Household Finance Corp.*, 208 F. 2d 667, has been questioned by the First Circuit in *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190.

would exclude from its coverage those employees who were engaged in the production of [goods] for interstate transportation for use or consumption, as distinguished from transportation of them for sale or exchange" (339 U.S. at 512). In addition, *Turpin* is factually distinguishable from the instant case. There, as noted above, the court found that the plans and specifications were incidental to the employer's principal business of giving professional advice to its clients. Here, in contrast, the customer itself conceived the ideas and furnished the basic designs for the work (R. 255), so that the finished draftings and designs are the principal product of Far West's business.

Far West also cites *Collins* v. *Ford, Bacon and Davis,* 71 F. Supp. 229 (E.D. Pa.), but to the extent that that case has any application to Far West's business, it indicates plainly that the plans and specifications are "goods," for the court said:

> Plans, designs and letters by which information is transmitted can be considered "goods" only when the plans themselves or the information contained in the letters is the thing which the employer sells and his customers buy [71 F. Supp, at 230].

That is precisely the situation here, at least in the case of the Hughes Aircraft jobs. The thing which that customer bought was finished draftings or designs. Hughes had the necessary manpower to make the lay-out drawings or basic designs (R. 254); it had to farm out, so to speak, the scale-picture work.

Since, as we have shown, the draftings and designs

in this case constitute "goods" within the meaning of the Act, and since they were sent outside the State, the plaintiffs were engaged in actual, or primary, production for commerce, as well as in work "closely related" and "directly essential" to the production of goods for commerce, namely, aircraft, missile and electronic test equipment.

II. Employees compensated at an hourly rate are not "employed in a bona fide executive, administrative, professional * * * capacity" within the meaning of Section 13(a)(1) of the Act

The exemption set forth in Section 13(a)(1) of the Act applies to "any employee employed in a bona fide executive, administrative, professional * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)." The administrative Regulations defining and delimiting these terms [4] include a "salary test" which must be met in order for an employee to fall within one of these classifications. One of the elements in the definition of an "executive" is that he "is compensated for his services on a salary basis at a rate of not less than $80 per week;" [5] and one of the elements in the definition of a "professional" is that he "is compensated for his services on a salary or fee basis at a rate of not less than $95 per week" [6] (29 C.F.R. §§ 541.1(f), 541.3(e)).

[4] The Regulations defining and delimiting the terms "executive" and "professional" are set forth at length at pages 14–17 of the Opening Brief of Appellant Far West.

[5] As amended, 23 F. R. 8962, effective February 2, 1959; previously "$55 per week."

[6] As amended, 23 F.R. 8962, effective February 2, 1959; previously "$75 per week."

These Regulations, it is well established, "have the force of law as much as though they were written in the statute" (*Helliwell* v. *Haberman,* 140 F. 2d 833, 834 (C.A. 2); *Fanelli* v. *United States Gypsum Co.,* 141 F. 2d 216 (C.A. 2)), and an employer claiming the benefit of one of these exemptions has the burden of proving the existence of each of the conditions set forth in the Regulations, including the salary requirement. *Helliwell* v. *Haberman, supra; Fanelli* v. *United States Gypsum Co., supra; Walling* v. *General Industries Co.,* 330 U.S. 545, 547–548; *Smith* v. *Porter,* 143 F. 2d 292 (C.A. 8); *Walling* v. *Yeakley,* 140 F. 2d 830 (C.A. 10); *Walling* v. *Morris,* 155 F. 2d 832 (C.A. 6), modified on other grounds, 332 U.S. 422; *Helena Glendale Ferry Co.* v. *Walling,* 132 F. 2d 616 (C.A. 8); *Chepard* v. *May,* 71 F. Supp. 389 (D.C., S.D. N.Y. 1947); Annotation, 40 A.L.R. 2d 332. As the Eighth Circuit noted in *Smith* v. *Porter, supra,* the "precise question here is not whether the [plaintiffs] were employed in an executive capacity within the meaning the phrase may have in common usage, but whether [they] were so employed within the definition as promulgated by the administrator under authority of law" (143 F. 2d at 295).[7]

The salary test is, indeed, particularly appropriate. The reason underlying the allowance of the

[7] These decisions, all antedating the Fair Labor Standards Amendments of 1949 (which made no change in the exemption for executive, administrative and professional employees), derive additional force from Section 16(c) of those Amendments, in which Congress expressly ratified all outstanding Regulations of the Secretary in the following language:

exemption is, as pointed out by the Eighth Circuit in the *Helena Glendale* case, that "[E]xecutive, administrative and professional workers are not usually employed at hourly wages nor is it feasible in the case of such employees to provide a fixed hourly rate of pay nor maximum hours of labor" (132 F. 2d at p. 619). Further, the Report of the Presiding Officer issued to accompany the 1940 Regulations in which the test was initiated (5 F.R. 4077), characterized the salary criterion as the best indication of "the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable" as belonging to one of these classifications ("Executive, Administrative, Professional * * * Outside Salesman" Redefined, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, CCH Labor Law Service, 3rd Ed., Pars. 31,302 *et seq.,* at Par. 31,302.35). The *Yeakley, Morris*

Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, * * * in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

and *Chepard* decisions specifically sustained the validity of the salary test, denying exemptions claimed with respect to employees meeting the other requirements set forth in the Regulations.

Far West's argument that these plaintiffs were exempt from the overtime provisions of the Act as "executive" or "professional" employees cannot survive the trial court's finding that each plaintiff was "an hourly employee" (R. 46, 47, 49–50, 51–52). Plainly, an "hourly employee" is not "compensated on a salary or fee basis." Far West asserts (Opening Brief, pp. 17–19) that these plaintiffs received a guarantee of minimum weekly earnings based on a 45-hour week. However, the trial court's express findings that these plaintiffs were hourly employees, and its failure to find the existence of any such guarantee, indicate that it rejected this contention, which admittedly rests upon conflicting testimony.

Having failed to show compliance with the salary requirements of the Regulations, Far West has not sustained its burden of showing that these plaintiffs are exempt from the Act as executive or professional employees.

CONCLUSION

The decision of the court below, holding these employees to come within the coverage of the Fair Labor Standards Act and that they are not exempted from

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See *Steiner* v. *Mitchell*, 350 U.S. 247, 255; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16–17.

its provisions as executive or professional employees, should be affirmed.

Respectfully submitted.

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